

IN THE FIJI COURT OF APPEAL AT SUVA  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0017U/96S  
(High Court Civil Action No. 4 of 1992)

BETWEEN:

FRESH FISH EXPORTERS (FIJI) LIMITED

*Appellant*

AND:

WASAWASA FISHERIES LIMITED

*Respondent*

Coram:

The Hon. Sir Moti Tikaram, President  
The Rt. Hon. Sir Maurice Casey, Justice of Appeal  
The Hon. Mr. Justice R. Savage, Justice of Appeal

Hearing:

20 May 1998

Counsel:

Mr. R. Smith for the Appellant  
Dr. M.S. Sahu Khan for the Respondent

Date of Judgment:

29 May 1998

---

**JUDGMENT OF THE COURT**

---

This is an appeal from the judgment of Pathik J. given in the High Court at Suva on the 26 March 1996 in an action arising out of a contract in the form of a written agreement, entered into between the appellant (hereafter called "Fresh Fish") and the respondent (hereafter called "Wasawasa"). It is dated 25 August 1989. We refer, in general terms, to the relevant parts of the written agreement as follows: Wasawasa is referred to as the vendor and Fresh Fish as the purchaser. The parties' intentions are stated to be that the vendor had agreed to sell and the purchaser to buy a ship known as the "Sunbird", certain specified equipment and the goodwill of the vendor on the terms and conditions set out. These were, so far as is relevant, that Fresh Fish would pay for the Ship and equipment \$115,000 and for the goodwill, know-how, skills and other ancillary matters \$267,342 (making a total of \$382,342). This sum was to be paid as to

\$235,000 on the date of the agreement, that is the 25 August 1989, (Clause 3.2 (a) of the agreement) and the balance of \$147,342 to the Fiji Development Bank, to discharge all encumbrances over the ship to that bank and to reimburse any payments made to the bank on account of the encumbrances since 1 February 1989 to the date of the agreement, on or before 60 days following the date of the agreement (Clause 3.2 (b)).

The agreement then provided that notwithstanding anything contained in the agreement, right title and interest in the ship and equipment "will pass to the purchaser" on the date of the agreement. It went on to provide that on the "Completion Date", which was defined as the date upon which the purchaser paid the \$147,342 to the Fiji Development Bank, the vendor would deliver to the purchaser all documents necessary to perfect the transfer and evidence its title.

Fresh Fish in its statement of claim pleaded that the property in the ship and equipment passed from Wasawasa to Fresh Fish on the date of the agreement and Wasawasa delivered it to Fresh Fish on that day. Further that it, Fresh Fish, had performed its obligations under the agreement and was entitled to receive a formal transfer of the ship. It further alleged that some two and a half years after the agreement executed, in March 1992, Wasawasa wrongfully took the ship Sunbird and equipment from Fresh Fish and continued to hold it.

Fresh Fish sought a declaration that it was the lawful owner of Sunbird, an order for possession and damages for detention of the ship, an order that Wasawasa deliver a transfer of the ship and, alternatively, that Fresh Fish be relieved of the forfeiture (if any) of its rights

and interests under the agreement upon such terms as the Court thought fit. At this point it is convenient to record that the learned trial judge in his judgment found that possession of Sunbird had been given to Fresh Fish upon execution of the agreement and that there was no dispute that Fresh Fish had the use of the Ship until March 1992 when it was taken by Wasawasa, according to it for non-compliance with the provisions of the agreement regarding payment of the purchase price in respect of both the sums specified. At this point it is also helpful to record that by an agreement also dated 25 August 1989, Fresh Fish employed Wasawasa to manage its business for it, and it was a condition of the agreement that Wasawasa would employ one Graham Southwick as its manager for the term of the agreement. It is also to be noted that Graham Southwick was at the time a director of the Fresh Fish and of Wasawasa; indeed he executed the sale and purchase agreement for both companies. In passing it may also be noted that both companies had the same secretary, an accountant Mr Zarin Khan of the firm of Zarin Ali and Associates who also executed the sale and purchase agreement for both companies. The physical possession of the ship was thus still, from a practical point of view, no doubt in the hands of Wasawasa but the legal position was that it was in the possession of Fresh Fish. It may be observed that the management agreement makes this quite clear; in particular clause 4 provides that Wasawasa will manage Fresh Fish's business and that it, and Southwick, shall at all times exercise its powers and carry out its duties as reasonably directed by Fresh Fish and at all times comply with all lawful and reasonable instructions given it by the directors of Fresh Fish. At this point it may be noted that the learned trial judge took Mr Southwick's role as an officer common to both companies, who had the actual management of the enterprise, into account in his assessment of the evidence. He expressly found that everything that went on in

regard to the two companies was well within Mr Southwick's knowledge and he could manipulate matters as he wished.

Returning to the pleadings Wasawasa in its final statement of Defence admitted that there was an agreement concerning the ship Sunbird but said that agreement was subsequently varied as a result of discussion between the parties. The variation was alleged to be that Wasawasa would "forego for a time" the requirements of the agreement relating to the payments of the two sums of money and in return Fresh Fish would pay a lease fee for the ship of \$5,000 per month, which Wasawasa had then assigned to the Fiji Development Bank. Further, that after Fresh Fish paid the two sums of money Wasawasa would transfer Sunbird to it. It went on to allege that Wasawasa had leased Sunbird to Fresh Fish from March 1989 to March 1992 under this variation agreement and under that lease agreement Fresh Fish operated Sunbird and retained all the revenue earned by the ship, paying to Wasawasa only the lease fee of \$5,000 per month. It further denied it wrongfully took the ship and asserted that it had always had control and ownership of the ship, but subject to the lease agreement which was terminated in March 1992. Wasawasa then "continued" to exercise control and management of the ship on the basis that Fresh Fish had not met its obligations and so was not entitled the relief it sought.

Wasawasa also made a counter claim. It alleged that pursuant to the variation of the 25 August 1989 agreement previously pleaded it leased the ship to Fresh Fish for a monthly fee of \$5,000 and that the sums of \$235,000.00 and \$147,342 remained due and owing to it and still have not been paid. Alternatively, it said both sums had still not been paid and Fresh Fish was in breach of the agreement as varied and the original agreement, as a result of which

Wasawasa lawfully rescinded the agreement. It claimed \$382,342.00, being the total of the two sums, with interest, or alternatively, a declaration that, it is the lawful owner of the ship.

In his judgment the learned trial Judge canvassed the oral evidence given and considered a number of the exhibits and concluded that the dealings between the parties which had been going on for some time were finalised on the 25 August 1989. He concluded that the terms of the agreement were not fully complied with by Fresh Fish. In particular he found that the payment of the \$235,000 had not been made but accepted that the \$147,342 had been paid by the payments of \$5,000 per month. He found that possession of the ship was given to the Fresh Fish upon execution of the agreement and that Fresh Fish had the use of the vessel until it was taken away from it in March 1992. He further found that in terms of the agreement Wasawasa was required to execute a transfer of the vessel to Fresh Fish because Fresh Fish had paid the \$147,342 and, as earlier noted in this judgment, the date of that payment was the "Completion Date.". Further, he said that subject to what he was about to say in relation to the alleged variation of the provisions of the agreement, he found that the agreement was a straight out sale and purchase agreement on the terms and conditions set out in it.

The learned judge then went on to consider the variation of the agreement issue. He concluded that this allegation made by Wasawasa in the pleadings and put forward in evidence by Mr Southwick, the sole witness for Wasawasa, was an afterthought by Mr Southwick. He canvassed the evidence of the other witnesses and discussed the submissions made by Dr. Sahu Khan, Wasawasa's counsel, particularly in relation to the parol evidence rule, and held that the agreement stood unvaried. He then held that Wasawasa had wrongfully

rescinded the agreement. This was on the basis that he had rejected the variation of the agreement allegation, and further, that Wasawasa had acquiesced in the carrying on of the business for two and a half years by Fresh Fish. Further, that Fresh Fish had paid the \$5,000 per month on account of the amount due under clause 3.2.(b), namely, \$147,342. He held that Wasawasa had unlawfully detained the vessel. He then found that for the reasons he had given Fresh Fish substantially succeeded in its claim; but on the other hand Wasawasa had failed to prove its counter claim which he accordingly dismissed with costs. This latter determination was on the basis that Wasawasa had failed in establishing its fundamental premise that there had been a variation to the agreement and also that Fresh Fish having paid the \$147,342.00 it was entitled to a transfer of the ship. One might add it could scarcely be supposed that Wasawasa could properly rescind two and a half years after the agreement was executed and implemented to the extent that it had been without giving notice to Fresh Fish requiring completion within a reasonable time.

The learned trial Judge then gave judgment for Fresh Fish against Wasawasa in the following form:

- “(a) That upon payment by the Plaintiff (Fresh Fish) to the defendant (Wasawasa) within six weeks from this judgment the sum of \$235,000 which was required to be paid by the Plaintiff under item 3.2(a) of the Agreement dated 25 August 1989 the possession of the vessel “Sunbird” and its immediate transfer in the name of the Plaintiff is ordered AND if default is made in the said payment the agreement shall be deemed to have been rescinded and the defendant shall do what it likes with the vessel.*
- (b) That upon payment of the said sum of \$235,000 the Defendant do give credit to the Plaintiff for the sum of \$5,000 per month*

*paid to Fiji Development Bank for 30 months or whatever sum has been paid in this manner towards the purchase price of the said vessel to fulfill the requirements of item 3.2(b) of the said agreement.*

- (c) That the Plaintiff is not entitled to damages for the alleged unlawful detention as the Plaintiff had itself failed to comply with the payment of \$235,000 under item 3.2(a) of the agreement whilst it made full use of the vessel by doing buisness with it and not accounting to the defendant or anyone else for the proceeds from the said business.*
- (d) The defendants are ordered to pay the costs of this action which is to be taxed if not agreed."*

Though judgment was thus given for Fresh Fish it was not satisfied with the orders made of and some of the findings of the Court. It has accordingly appealed. The grounds of its appeal are, in effect first that the learned trial judge was wrong in finding that Fresh Fish had failed to pay the \$235,000, such finding being unreasonable and contrary to the weight of the evidence; and, second, that as a result of this finding he misdirected himself regarding the appellants' right to damages and erred in law in finding Fresh Fish was not entitled to damages. It sought in effect an order for the return of the ship Sunbird, or recovery of its value as assessed, and damages for its detention.

Wasawasa, on the other hand, though judgment was given against it on its counter-claim, has not appealed though Dr. Sahu Khan did raise a number of matters in a formal notice in relation to the grounds on which the learned trial Judge found as he did. The dismissal of the counter claim with costs accordingly stands.

The fundamental issue upon which this appeal depends is whether the learned trial judge was correct or not in finding that Fresh Fish had not paid the \$235,000.00 to Wasawasa. We are satisfied he was correct in rejecting the variation of the contract contention and in holding that the \$147,392 had been paid. We turn to what the judge said:

*“Subject to what I say hereafter in regard to payment under clause 3.2(a), it is clear from the evidence that the terms of the agreement were not fully complied with by the Plaintiff. I find that the mode of payment of the purchase price of the vessel as required under item 3.2(a) was not met, except to the extent of \$5,000 per month paid under item 3.2(b) to Westpac to clear the debt of the Defendant. I therefore disagree with the Plaintiff’s assertion that it had paid the amounts required under items 3.2(a) and 3.2(b) of the agreement. In my view, on the evidence and in the circumstances of this case, bearing in mind the Reserve Bank conditions of approval, payment by issue of shares to the value of \$235,000 is not payment as intended under item 3.2(a). It had to be in cash and not in the form of shares. I therefore reject the opinion of BUKSH that payment could be made by issue of shares for I find that that was not what was intended nor is there anything in writing or otherwise to show that there was a variation of the agreement in that regard. Hence I find that this sum (under claim 3.2(a)) was not paid by the Plaintiff.”*

The learned judge’s view that the payment of the \$235,000 had to be in cash appears to stem from the view he took of the Reserve Banks conditions of approval to the issue of shares in Fresh Fish. It was accepted by both counsel that Reserve Bank approval under the Exchange Control Act was required where overseas shareholders are to take majority or controlling shares in a local company. It appears that the accountant Mr Zarin Khan, referred to earlier, had sought approval from the Reserve Bank to the issue of shares in Fresh Fish by a letter in May 1989. A copy of that letter was not produced at the hearing but the Reserve Bank’s reply, dated 5 June 1989 was. The letter said permission under the Exchange Control Act was



granted to Fresh Fish to issue shares in two classes; an A class with voting rights and a B class with no voting powers. The shares were all to be \$1 shares. 235,000 A class shares were to be issued to Wasawasa and 500,000 A class shares were to be issued to two Australian Companies. There were also 10,000 B class shares but they did not affect the question of control. The Bank permission was, however subject to a condition that the bank received "confirmation of receipt of funds of F\$745,000.00 originating from off shore." It is also clear, however, that Reserve Bank approval is not required for the issue of shares to Fiji incorporated and resident companies. It would follow that the issue of shares in Fresh Fish to Wasawasa would be perfectly legal without Reserve Bank permission but not to the Australian companies, as that would give them control without the permission of the Reserve Bank. It should be noted at this point that share certificates were produced as exhibits which showed that Wasawasa was the registered holder of 235,000 A class shares and 4583 B class shares in Fresh Fish, the certificates being dated 31 March 1989. This was some weeks before Mr Zarin applied in May 1989 for approval, presumably in respect of the two Australian Companies, but since his letter to the banks was not produced we are not aware of the terms of the request.

These certificates were put in evidence by Wasawasa through a Fresh Fish witness, a Mr Karim Buksh, an accountant and business consultant with professional qualifications in both Fiji and Australia and considerable experience both generally in the business world and the fishing industry in Fiji. Mr Buksh had been called in by Fresh Fish at the time the ship had been taken in 1992. In his evidence in both cross-examination by counsel for Wasawasa and in re-examination by counsel for Fresh Fish he firmly expressed the view that the \$235,000 was satisfied by the shares issued to Wasawasa. He pointed out that if Fresh Fish had

owed Wasawasa the \$235,000 there would be an entry of the liability in the company accounts, and there was no such entry. He was asked in cross-examination if there was any entry in Fresh Fish's accounts for the years 1989, 1990, 1991 to show that the \$235,000 was paid and he replied there was none, it was in exchange for shares. Later in re-examination he was asked if it was possible to come to any conclusion other than that it had been paid, and he said no. Later still, in answer to the learned judge, he said it was the only logical conclusion. In the accounts of Wasawasa for the years 1989, 1990, 1991 produced to the Court by Wasawasa's only witness Mr Southwick, director of the company, each balance sheet shows an entry under the heading "Investment" of \$235,000 and the notes to the accounts state the investment consists of 235,000 class A shares of \$1 each in Fresh Fish representing 35% equity holdings held in Fresh Fish. It is to be noted that the 1989 balance sheet shows that there was no such entry in 1988. Further, none of the accounts for either company show any entry relating to such a debt owing by Fresh Fish to Wasawasa; nor it might be added, do they make any reference to a leasing arrangement in respect of the ship.

Mr Southwick gave evidence directed to showing that the \$235,000 had never been paid. He also said that in April 1989 he gave Zarin Ali and Associates a cheque drawn on Wasawasa's account with Westpac Bank in Suva Fiji, to be paid when the off shore money came in. Zarin Ali and Associates were accountants to both Fresh Fish and Wasawasa, as is noted earlier in this judgment. Dr. Sahu Khan referred to this cheque in his submissions before us but we did not find the evidence in relation to it very useful. Apart from the source of the evidence, that of Mr Southwick (whose evidence had been to a substantial degree rejected by the learned trial Judge). We note the cheque relates to April 1989 and that was some four months and more

before the agreement was signed and before approval had been sought from the Reserve Bank, and before the Bank had given its permission which was made subject to "the condition that we are provided with a bank confirmation of receipt of funds of F\$745,000 originating from off shore."

On a careful consideration of all the material we find we are unable to accept the learned trial judge's view that payment of the \$235,000 had to be made in cash. We do not find anything in the written agreement that requires it to be in cash. We think there is no reason why the requirement of payment of the \$235,000 should not have been satisfied in any way that was acceptable to the parties. An exchange by way of shares for a debt is not uncommon and that it occurred in this case was the firm view of Mr Buksh. The accounts of the two companies support the view. Did the Exchange Control Act have the effect of making such a transaction illegal? We do not think so. Transactions of such a nature between two Fiji companies do not appear to be prohibited though it is clear that before any shares could lawfully be issued to the Australian Companies the Reserve Bank had to be satisfied that \$745,000 had been remitted to Fiji from abroad. Such evidence as there was suggested it had not. That may have invalidated any shares issued to those companies but does not on its face show illegality in respect of shares actually issued to Wasawasa. Illegality, we add was not raised in the pleadings. It follows that in our view Fresh Fish has established that the \$235,000.00 has been paid and consequently that it is entitled to recover possession of the ship.

Dr. Sahu Khan made a number of submissions in terms of the Sale of Goods Act in relation to the passing of the property in the ship and possession of it but we do not think they affect the matter and, in particular, we do not think that considerations applicable to an unpaid seller's lien apply.

It further follows that Fresh Fish are entitled to damages for wrongful detention of the ship. The ascertainment of the amount of such damages is not something this Court will embark upon and that matter will be remitted to the High Court for determination.

The formal order of the Court will therefore be that the appeal is allowed and there will be a declaration that Fresh Fish is the lawful owner of the Ship Sunbird. There will be an order that within 14 days Wasawasa deliver the ship to Fresh Fish and execute all necessary documents to effect the transfer. Further there will be an order remitting the issue of damages for unlawful detention to the High Court for determination in accordance with this judgment.

The appellant is entitled to costs which we fix at \$600, and disbursements to be fixed by the Registrar if the parties cannot agree.

*Moti Tikaram*

.....  
Sir Moti Tikaram  
President

*M. Casey*

.....  
Sir Maurice Casey  
Justice of Appeal

*S. Savage* JH

.....  
Mr. Justice Savage  
Justice of Appeal

**Solicitors:**

Messrs. Munro Leys and Company, Suva for the Appellant  
Messrs. Sahu Khan and Sahu Khan, Ba for the Respondent